

3/22/18

COMMONWEALTH OF MASSACHUSETTS

Superior Court Barnstable, ss
Filed MAR 22 2018
<i>Scott B. Nicholas</i> Clerk

BARNSTABLE, ss.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 2011-00008

COMMONWEALTH

v.

JAMES HAYWARD

MOTION TO DISMISS

The defendant hereby moves this Honorable Court to dismiss the indictments against him as this Court has continuously found him incompetent to stand trial for the entirety of the seven years that have elapsed since the alleged offense, and he is not restorable to competency but remains confined on the charges. This motion is based on (1) the constitutional speedy trial and due process principles outlined by the United States Supreme Court in Jackson v. Indiana, 406 U.S. 715, 740 (1972); and (2) pursuant to G. L. c. 123 § 16 (f) which affords this Court the discretion to dismiss the indictments in the "interests of justice" prior to the date of a statutorily mandated 16(f) dismissal. See Commonwealth v. Calvaire, SJC 12084 (2017).

FACTUAL BACKGROUND

On January 7, 2011, this defendant was evaluated by Dona Maynard, Ed. D. for competency pursuant to G. L. c. 123 s. 15(a) as ordered by the Barnstable District Court. Based upon that evaluation, the defendant was committed to Bridgewater State Hospital for further evaluation until January 27, 2011.

On February 16, 2011, this defendant was arraigned on the charges of Burglary and Assault on Occupant, Aggravated Assault and Battery, Assault with a Dangerous Weapon,

Assault and Battery, Operating to Endanger, Assault and Battery with a Dangerous Weapon, Assault and Battery and Threat to Commit Murder. On the date of the arraignment, the Court ordered that the defendant be evaluated for competency by the Court Clinician pursuant to G.L. c. 123 s. 15(a). A hearing on competency was scheduled for the following day.

On February 17, 2011, after hearing, the Court ordered that the defendant be committed to Bridgewater State Hospital pursuant to G.L. c. 123 s. 15(b) to be evaluated for competency and for a neuro-psychological examination. A further hearing on the defendant's competency was scheduled for March 7, 2011. On that date, the defendant was remanded to the custody of the Barnstable County Sheriff's Department, presumably for an evaluation by a Commonwealth expert.

On September 12, 2011, the Court determined the defendant to be not competent pursuant to a report by Dr. Richard dated March 2, 2011. The Court ordered, again pursuant to the report by Dr. Richard, that the defendant be committed to Bridgewater State Hospital pursuant to G.L. c. 123 s. 15(b) to be further evaluated for competency and to be evaluated for commitment pursuant to G.L. c. 123 s. 16(a) for restoration of competency. The Court ordered a hearing on the matter to be held on October 21, 2011. As of October 21, 2011, the defendant had been committed to Bridgewater State Hospital for a total of 70 days.

According to the report of Charles Carroll, Ph. D. the defendant "continues to present with deficits in his ability to assist his attorney with rational understanding due to mental defect." (See Carroll report p. 16) According to Dr. Carroll, the defendant's abilities may improve, but there is no "psychiatric treatment available to improve memory functions so commitment to a psychiatric hospital will not improve him in this regard." (See Carroll report p. 16) Also, Dr. Carroll indicates that the defendant is not mentally ill and is not a candidate for civil commitment pursuant to G.L. c. 123 s. 16 (a). (See Carroll report p. 17)

On October 21, 2011, after hearing, the Court found the defendant to be not competent to stand trial based upon the report of Charles Carroll, Ph. D. dated October 20, 2011. The Court ordered the defendant remanded to the Custody of the Barnstable County Sheriff's department and continued the matter until November 18, 2011 for further hearing.

The matter was continued until a further evaluation was ordered pursuant to G. L. c. 123 s. 15(b) on March 2, 2012. According to Dr. Carroll's report dated April 19, 2012 the defendant's condition had not changed and Dr. Carroll opined that the defendant's condition was

not likely to improve and that further assessment was not indicated. (See Carroll report p. 22) The matter was heard on May 30, 2012, at which time the defendant was found to be not competent and a \$10,000 bail was set in lieu of further commitment. On September 20, 2012 the defendant was released on probation officer surety. On July 31, 2012 the defendant was again found to be incompetent to stand trial after an outpatient evaluation but based upon violations of his conditions of release was held on \$25,000 bail on this matter. The defendant has remained in custody since that time. Since November 17, 2016, the defendant is held on this bail at the Barnstable County Correctional Facility as he remains incompetent, but not subject to commitment at a State Hospital because he is not mentally ill. In November of 2016 at a hearing as to the defendant's competency, the Court Clinician, Dr. Maynard opined that the defendant continues to be incompetent to stand trial with no real likelihood of being restored to competency.

ARGUMENTS

I. THE CHARGES AGAINST MR. HAYWARD SHOULD BE DISMISSED BECAUSE HE HAS BEEN HELD ON THE CHARGES LONGER THAN REASONABLY NECESSARY TO CONCLUDE THERE EXISTS NO SUBSTANTIAL PROBABILITY HE WILL EVER ATTAIN COMPETENCY IN THE FORESEABLE FUTURE.

The Continued Confinement on the Charges Violates the Principles Established by the United States Supreme Court in Jackson v. Indiana, 406 U.S. 715 (1972).

"A person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." Jackson v. Indiana, 406 U.S. 715, 738 (1972). See also Commonwealth v. Guinta, 28 Mass. L. Rep. 501, *7-8 (Sanders, J. 2011) ("the mere act of holding criminal charges over a defendant who will never be able to contest them

offend[s] principles of fundamental fairness.").

Over the course of the past seven years, four separate doctors have opined that Mr. Hayward lacks the competency necessary to stand trial. The Commonwealth has not contested the question of competency since retaining Dr. Roy seven years ago, who opined that the defendant was not competent. There exists no evidence that Mr. Hayward has any clear path to becoming competent.

The unlikelihood of restoration makes dismissal of the criminal charges an appropriate remedy. In Jackson v. Indiana, the United States Supreme Court discussed the unfairness of relegating an incompetent defendant to a more stringent standard of release due to the pendency of a criminal case than he would face solely in a civil commitment context. See 406 U.S. at 730. More specifically the court held that "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-1209 or § 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment. Id.¹ Such a situation becomes particularly unfair where, as here, the defendant has no reasonable prospects of becoming competent, and thus exiting the criminal system, whereas he does have reasonable prospects of eventually meeting the criteria for a less restrictive alternative to a hospitalization should he be subject to civil proceedings for

¹ For similar reasons, the Court also opined that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process. Jackson v. Indiana, 406 U.S. at 730. Similarly, the Illinois Supreme Court found, in relation to a deaf-mute charged with murder that "defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." People ex rel. Myers v. Briggs, 46 Ill. 2d 281, 263 N. E. 2d 109, 113 (1970). The fact that Mr. Davenport is facing three and one-half additional years of commitment instead of indefinite commitment should not be determinative of the unfairness of his continued detention.

commitment under G.L. c. 123, §§ 7 and 8.

The continued importance of the Jackson holding to incompetent defendants held in custody in Massachusetts was re-emphasized in Abbott A. v. Commonwealth, 458 Mass. 24, 25 2010. In deciding that the ninety day period of confinement under G.L. c. 276, sec. 58A is tolled under Rule 36 after a defendant has been found incompetent, the Court emphasized how an incompetent defendant's detention is limited by constitutional requirements of due process. Id. at 37. The due process limitation is three-fold. Id. at 37. First, an incompetent defendant or juvenile may not be held in criminal custody awaiting trial "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." Abbott A. 458 Mass. at 37 quoting Jackson v. Indiana, 406 U.S. at 733, 738. To satisfy this due process requirement, referred to in Jackson as the "rule of reasonableness,"² 458 Mass. at 37, quoting Jackson, 406 U.S. at 733, a judge must make a searching inquiry into the likelihood that a defendant or juvenile will become legally competent in the foreseeable future. 458 Mass. at 37, quoting Jackson, 406 U.S. at 733. See Foucha v. Louisiana, 504 U.S. 71, 79 (1992) (State entitled to detain incompetent defendant "only long enough to determine if he could . . . become competent"). For adults and juveniles alike, if there is no substantial probability of attaining legal competency in the foreseeable future, "then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." Abbott A., 458 Mass. at 38-39, quoting Jackson, 406 U.S. at 738. See Foucha v. Louisiana, supra at 79.

² Although Abbott A. involved a juvenile case, the SJC extended the "rule of reasonableness" protection to adults as well as juveniles. "Even if under Federal constitutional law the 'rule of reasonableness' does not apply where there is a finding of dangerousness that triggers criminal pretrial detention, we hold here that under art. 12 of the Massachusetts Declaration of Rights, the 'rule of reasonableness' applies to an incompetent adult criminal defendant or juvenile who is detained before trial on grounds of dangerousness under § 58A." 458 Mass. at 37, note 14.

Secondly, the Abbott A. court stated that even if it is determined that the adult defendant or juvenile "probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." Abbott A., 458 Mass. at 39, quoting Jackson, *supra*. The SJC in Abbott A. interpreted this language in Jackson to mean that a finding of substantial probability that an incompetent adult defendant or juvenile will attain legal competency in the foreseeable future must be supported by evidence that the defendant or juvenile has made progress toward achieving competency. Abbott A., 458 Mass. at 39.

Thirdly, even where there is a substantial probability that an adult defendant or juvenile will be restored to competency in the foreseeable future and there is progress toward achieving competency, the Abbott A. Court found that due process requires that an incompetent defendant or juvenile not be detained under § 58A for an unreasonable period of time. Abbott A., 458 Mass. at 39. See United States v. Magassouba, 544 F.3d 387, 416 (2d Cir. 2008). What constitutes an unreasonable period of time involves a totality of the circumstances analysis, including the length of the pretrial detention, the degree of dangerousness, the seriousness of the offense charged, the probability that the defendant or juvenile shall become competent, the anticipated time frame to achieve competency, whether the defendant or juvenile has prolonged his period of incompetency by refusing to take prescribed medication, and any unfair prejudice to the defendant or juvenile. Abbott A. at 39-40. See United States v. Magassouba, 544 F.3d at 416-417.

Here, the continued detention of Mr. Hayward constitutes a Due Process violation, which should be remedied through a dismissal of the Indictments. Due process is violated where there is "substantial injustice in keeping an unconvicted person in . . . custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time."

Jackson, 406 U.S. at 735, quoting Cook v. Ciccone, 312 F. Supp. 822, 824 (W.D. Mo. 1979).³

The years that Mr. Hayward has spent confined on this case have become unreasonable and have unfairly infringed on his constitutionally protected liberty interests guaranteed by the United States Constitution and the Massachusetts Declaration of Rights. Under the Fourteenth Amendment, the Commonwealth may not "deprive" any person of "liberty . . . without due process of law." Article 12 of the Massachusetts Declaration of Rights guarantees that "no subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." See also Article 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws"); Article 1 ("All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . .").

II. THIS COURT SHOULD USE ITS DISCRETION TO DISMISS THE PENDING INDICTMENT BECAUSE MR. HAYWARD HAS BEEN HELD FOR SEVERAL YEARS AND IS NOT RESTORABLE TO COMPETENCY.

Pursuant to G. L. c. 123 sec. 16(f) this court has two avenues upon which to dismiss the Indictments; (1) the Court is mandated to dismiss the charges after "the expiration of the period of time equal to the time of imprisonment which the person would have had to serve prior to becoming eligible for parole," which is "one half of the maximum sentence potential sentence," or (2) "in the interest of justice may dismiss the criminal charges against such person

³ Some jurisdictions permit hospitalization of incompetent defendants only for such period limited to determining the likelihood of recovery of competency. See People v. Young, 220 Ill. App. 3d 98, 104, 581 N.E.2d 371 (1991) (under state statute, defendant may move for discharge hearing if it is not substantially probable that he will be fit for trial within a year); In re Polk, 71 Cal. App. 4th 1230, 1238, 84 Cal. Rptr. 2d 389 (1999) (three-year limit in statute applied to aggregate of all commitments on same charge). See also Mont. Code Ann. § 46-14-221(3)(a), as amended through § 3, Ch. 140, L.2007 ("[C]ommitting court shall, within 90 days of commitment, review the defendant's fitness to proceed [to trial]. If the court finds that the defendant is still unfit to proceed and that it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed").

prior to the expiration of such period."

G. L. c. 123 sec. 16(f) provides in full:

(f) If a person is found incompetent to stand trial, the court shall send notice to the department of correction which shall compute the date of the expiration of the period of time equal to the time of imprisonment which the person would have had to serve prior to becoming eligible for parole if he had been convicted of the most serious crime with which he was charged in court and sentenced to the maximum sentence he could have received, if so convicted. For purposes of the computation of parole eligibility, the minimum sentence shall be regarded as one half of the maximum sentence potential sentence. Where applicable, the provisions of sections one hundred and twenty-nine, one hundred and twenty-nine A, one hundred and twenty-nine B, and one hundred and twenty-nine C of chapter one hundred and twenty-seven shall be applied to reduce such period of time. On the final date of such period, the court shall dismiss the criminal charges against such person, or the court in the interest of justice may dismiss the criminal charges against such person prior to the expiration of such period. (Emphasis Added)

Here, Mr. Hayward faces a maximum of life imprisonment on Unarmed Burglary and Assault charge in violation of M.G.L. c. 266, §14. He was found to be incompetent to stand trial by the Barnstable Superior Court on September 12, 2011, but arguably has been incompetent since before his arraignment in this court, given the fact he had been committed to Bridgewater State Hospital for evaluation of competency while the case was pending in Barnstable District Court and all the competency reports filed with the court in this matter concluded he lacked competency to stand trial. Pursuant to G.L. c. 123, § 16(f), he is entitled to dismissal after fifteen years, which is November of 2025. However, this Court need not wait seven more years to dismiss the charges because the interest of justice, as described further below, support a dismissal at the present time.

The legislative history behind G.L. c. 123, sec. 16(f) supports the dismissal of a charge in the "interests of justice" where the defendant has no reasonable prospect of returning to competency. In *Foss v. Commonwealth*, 437 Mass. 584, 584-585 (2002), the Supreme Judicial

Court noted that the legislative history⁴ of 16(f) supported its interpretation of that section concerning the maximum time period during which criminal charges could remain pending against an incompetent defendant. That Court recounted how the Massachusetts Legislature established the Special Commission on Mental Health in 1961 and directed it "in particular [to] consider the laws relating to the methods of commitment, treatment and release of patients." Foss at 588, quoting Resolves 1961, c. 89. That Commission's work led to the presentment of draft legislation in 1967, which addressed, among other subjects, the pretrial commitment of incompetent criminal defendants. Id. A major goal was to eliminate the highly questionable practice of committing incompetent criminal defendants indefinitely, while awaiting their unlikely restoration to competency, and also eliminating the indefinite pendency of criminal charges that, most often, significantly limited the incompetent criminal defendant's access to treatment by more effective civil means. Id. at 588-589 (Internal citations omitted).

The civil rights of committed persons were a major consideration of the Special Commission and its proposed legislation, which served as the basis of the health code revisions. Id. at 589. General Laws c. 123, § 16 (b) and (c), effectively eliminated the problem of the indefinite commitment of incompetent defendants, providing that "an order of commitment . . . shall be valid for six months" and "after the expiration of a commitment under [§ 16 (b)], a person may be committed for additional one year periods . . . but no untried defendant shall be so

⁴ Studies conducted at Bridgewater State Hospital beginning in 1963 revealed that of approximately 200 men then indefinitely committed the Bridgewater staff, with the assistance of the Law-Medicine Institute (conducting the study) were able to return fifty-three to trial. Foss, 427 Mass at 589, citing McGarry, 49 B.U.L. Rev. at 50-51. Of those returned for trial, thirty-five had been committed for less than two years. Id. The mean length of the hospitalization of the fifty-three men returned for trial was 3.7 years. Id. The mean length of the hospitalization of the 147 who were not able to return for trial was fifteen years. Id. The implications of the study demonstrate that a significant population of the men then not able to return for trial would have been competent within two years of their hospitalization. Id. Thus, it makes little sense for charges to remain pending against an incompetent defendant long past the period of time in which he is likely, if at all, to regain competence. Id. See State ex rel. Haskins v. County Court, 62 Wis. 2d 250, 268 [1974] [It would be "a rather pointless and a cruel application of the law, as well as an additional burden on prosecutors and courts, to keep pending criminal charges that will never be brought to trial"].

committed unless . . . the court also finds said defendant is incompetent to stand trial." *Id.* at 589. A committed, incompetent defendant is guaranteed reevaluation after the first six months and at least annually thereafter, with the presumption favoring competence. The statute also addresses the issue of indefinite pendency of criminal charges against an incompetent defendant, providing that "the court shall dismiss the criminal charges against [the incompetent criminal defendant]" on the final date of the period computed under § 16 (f).

Recently the SJC held that dismissal of criminal charges prior to the computed 16(f) date may be appropriate in the interest of justice. *Commonwealth v. Calvaire*, 476 Mass. 242, 243 (2016). The Court noted that in addition to providing for the calculation of the dismissal date of charges against an incompetent defendant, §16(f) contains a safety valve that allows a judge to dismiss charges prior to the calculated parole eligibility date 'in the interest of justice.' Thus a judge may consider factors that are not relevant to statutory computation. Use of the safety valve may be warranted in a case where . . . the defendant's chances of being restored to competency are slim."

Here, it is in the interest of justice to dismiss the indictments pending against Mr. Haycard. It is now clearly apparent that Mr. Hayward is unrestorable to competency and the indictments will never be tried or resolved. Any additional years of holding open the charges will not serve the ends of justice. The past seven years have demonstrated that Mr. Hayward will never attain competency. The dismissal of his case therefore serves the humane considerations embedded in original intent of the statute by avoiding prolonged confinement of persons who will never return to trial.

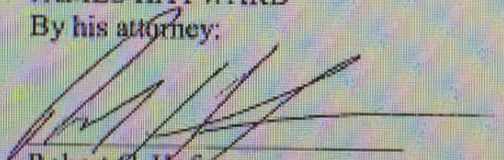
In *Calvaire* the Supreme Judicial Court cited approvingly to *Commonwealth v. Guinta*, 28 Mass. L. Rptr. 501, 2011 WL 3480959 (Sanders, J., March 3, 2011). See *Calvaire*, at *4. In

Quinta, a case where it was "uncontroverted" that the defendant would never be competent to stand trial, Justice Sanders dismissed indictments that carried a maximum potential sentence of life with the possibility of parole after fifteen years. Quinta, supra, at *3. She ordered dismissal well before the mandatory fifteen-year date was reached, instead dismissing the indictments pursuant to the "interests of justice" provision of § 16(f). See Id. And one of the "important" considerations underlying her dismissal order was the question of whether indefinitely holding the charges open would offend due process. Justice Sanders did not resolve that question, but did state, "there is something fundamentally unfair in keeping a criminal case open where the defendant, as a result of his incompetency, will never be in a position to challenge it on the merits." Id. at *4.

CONCLUSION

For the above reasons, the defendant respectfully requests that this Court allow the defendant's motion to dismiss.

Respectfully Submitted,
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DATED: March 21, 2018